

IN THE MATTER OF AN ARBITRATION

BETWEEN

United States Department of
Housing and Urban Development

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 3972

Daniel M. Winograd
Arbitrator

Grievant: C. Carstens
Discharge

FMCS No. 06-52736

1. The arbitrator was selected by the Federal Mediation and Conciliation Service in accordance with the parties' Collective Bargaining Agreement.
2. A hearing was held at 1670 Broadway, Suite 2500, Denver, Colorado, on October 30 and 31, and November 1, 2007.

Appearances for the Agency were:

Lisa Coronado, Attorney
Matt Mussetter, Attorney
Melissa Pingley, Legal Intern
Ben Johnson, HOC Director
Vicky Early, Operations Director
Sheila Ricks-Jordon, Director, Admin. Support Services
Barry Kahn (telephonically), Director of Travel Mgmt.
Theodore Ford (telephonically) Director of Employee
Support Services

Appearances for the Union were:

Michael Snider, Attorney
Snider & Associates, of Counsel
Ari Taragin, Attorney
Gary Mongelli, President
Colleen Burdick, Representative
Lori Roget, Steward
Gary Thacker, Vice President
Dorothy Crow-Willard, Steward
Marinella Murillo, Chief Steward
Perry Casper, Executive Vice President
Carla Carstens, Grievant

3. A stenographic transcript of the proceedings was received by the arbitrator on or about November 22, 2007.
4. The post hearing briefs of the parties were received by the arbitrator on or about February 6, 2008.

OPINION AND AWARD OF THE ARBITRATOR

ISSUE

The parties have stipulated that the issue in this matter is:

1. Did the removal of the grievant promote the efficiency of the service?
2. Did the Agency have just and sufficient cause when it removed grievant and was the removal reasonable discipline for grievant's actions?
3. Were the actions of the Agency discriminatory and based on grievant's race, sex or disability?
4. What is the remedy?

They have further stipulated that this matter is properly before the arbitrator for determination in accordance with the Collective Bargaining Agreement and the applicable statutes, rules and regulations, and that the arbitrator may retain jurisdiction for purposes of implementing any remedy ordered by the arbitrator.

RELEVANT CONTRACT PROVISIONS

(Jt. Ex. 11)

ARTICLE 20
DISCIPLINE

Section 20.01 - General

- (1) At times, it is necessary to take disciplinary action against an employee for misconduct.
- (2) The grievance procedure for disciplinary actions is set forth in this Article and is in lieu of the procedures identified in Article 22 (Grievance Procedure) except as provided in Section 20.03.

- (3) The objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of private, progressive discipline designed primarily to correct and improve employee behavior. However, major offenses may be cause for severe action, including removal, regardless of whether previous discipline has been taken against the offending employee. Bargaining unit employees shall be the subject of disciplinary action only for just and sufficient cause.
- (4) Actions shall be fair and equitable, i.e., Management shall consider the relevant factors given the circumstances of each individual case and similar cases, if any, to make a fair decision.

Section 20.03 - Disciplinary Actions other than Suspensions. . .

- (2) Letters of reprimand shall be placed in an employee's Official Personnel Folder for a period specified in the letter, but not to exceed two (2) years.

ARTICLE 49

GOVERNMENT CHARGE CARD PROGRAM FOR OFFICIAL TRAVEL EXPENSES

Section 49.01 - Purpose. Implementation of the Government employee individual charge card program will improve service to HUD employees traveling on official Government business away from the permanent duty station. This will also limit the amount of cash advance for travel expenses.

Section 49.02 - Centrally Billed. Charges for airline tickets will be centrally billed through Travel Management Centers (TMC). Other charges will be individually billed to individual cardholders. . .

Section 49.03 - Card Issuance. The Government Charge cards will be issued to permanent HUD employees who submit an application and (a) make two (2) or more trips a year, and (b) who request a card when authorized to travel. . .

Section 49.04 - Late Payment. Management will not consider charge card payments past due if the late payment of the bill results from an untimely reimbursement by Management of an employee's properly completed claim which was submitted on time. . .

Section 49.10 - Use of the Charge Card. Use of the charge card does not relieve Management or the employee from observance of the rules and regulations governing official travel as set

forth in the Federal Travel Regulations and HUD Handbook 2300.2 REV-3, Travel, or its successor.

Section 49.22 - Debt Collection. Management shall provide no more "assistance" with the collection of Government charge card debts than is currently available regarding the collection of privately owed debts. Unpaid card debts will be treated as any non-work related debt.

FACTS

The parties have entered into an extensive stipulation of facts concerning this matter. Additionally, the arbitrator heard approximately three days of testimony. The following facts were stipulated.

Grievant was first employed by the Agency as a Clerk/Typist in March, 1987. At the time of her removal in August, 2005, she was a Single Family Residential Specialist in the Denver Single Family Home Ownership Center (HOC) of the Real Estate Owned (REO) Division. In connection with performing her job duties, grievant was required periodically to travel away from the Denver office to oversee the management, marketing and sale of homes owned by the Agency after foreclosures or other transfers of the homes to the Agency by their prior owners. She had no responsibilities for handling money or for overseeing financial arrangements concerning the properties, but was responsible for monitoring the performance of real estate agents under contracts with the Agency to manage and market the properties. She was rated as "fully successful" or better in all relevant performance appraisals.

In order to facilitate payment and accountability for travel expenses, the Agency participates in the GSA "Smartpay" program. Under that program, the GSA has contracted with various credit card issuers to provide credit cards to Agency employees who travel at least twice per year in connection with their employment and who have submitted an application through their Agency supervisor to the credit card issuer. The card bears the employee's name and is assigned a distinct account number for that employee. If an employee is not deemed credit worthy by the issuer, the issuer may deny the employee's application for a Smartpay card.

Under the credit card agreement with the issuer, the employee agrees to make timely payment of all charges on the card, and the issuer agrees not to charge interest or late charges on account balances. The Agency, and the United States Government, generally, do not guarantee payment of the charges and do not assume any direct or indirect liability for payment of overdue or unpaid accounts. Rather, the agreement to pay the credit card charges is solely between the issuer and the employee. Employees obtain reimbursement for the travel charges incurred on the Smartpay card either by submitting requests to the Agency for reimbursement in advance of scheduled travel (supported by receipts and similar documentation after the travel occurs), or by submitting receipts and similar documentation to the Agency after

incurring the travel expenses. The Agency pays the employee the amounts approved for travel expenses, and the employee pays the credit card issuer. The issuer submits monthly delinquency lists to the Agency so that it is made aware of employees who are not paying the Smartpay charges in timely fashion.

Grievant was issued a Smartpay card in January, 1999. Because she had unpaid balances on the card, the issuer canceled grievant's privilege to use the card as of February 23, 2002. On November 18, 2002, she received a letter of reprimand (Jt. Ex. 1, Attach. 6) because she had maintained an unpaid balance on the card from June 2001 to July, 2002¹, and she had used the card to make an unauthorized purchase of approximately \$100.00 in September, 2001.

Approximately a year and a half after she received the written reprimand for misusing and failing to pay the Smartpay obligation, grievant received a two day suspension (to be served on non-working days) for three instances of being absent from work without leave. Grievant acknowledged that she had failed to follow proper procedures to request leave on the three days in question, and she did not grieve the imposition of the suspension. (Jt. Ex. 1, Attach. 9) She apparently had no further disciplinary problems until May 26 2005, when she was suspended for thirty days because her Smartpay account had become delinquent. (Jt. Ex. 1, Attach. 7)

¹The unpaid balance was \$3,117.59 as of the end of October, 2001. Grievant paid \$1,364.67 in November and finally eliminated the debt in July, 2002. The reprimand was issued four months after the balance was paid.

The evidence concerning the May 26, 2005, suspension indicates that grievant was authorized to travel from Denver to Washington D.C. from June 14, 2004 to June 18, 2004. In connection with that authorization, grievant received an advance against expenses on June 9, 2004, in the amount of \$817.20. On her return from Washington, she submitted receipts and vouchers totaling \$1,032.50, and on August 4, she was paid \$215.30 to bring her total reimbursement to the amount of the claimed expenses. On September 17, grievant was approved for travel to Minneapolis, Minnesota. She claimed reimbursement of \$751.26 on October 4, 2004.

Smartpay charges of \$855.99 for grievant's June trip to Washington were not paid as of the end of the card's billing cycle on September 12, 2004, even though she had received \$817.20 in June and \$215.30 in August. That balance remained unpaid as of the end of the October billing cycle on October 12, 2004. It was paid by December 6. However, charges of \$722.90 for the Minneapolis trip in September, were billed to the account before the end of the October billing cycle. Although grievant paid \$1,000 against the account on December 6, she continued to owe \$578.89 due to the addition of the charges for the Minneapolis trip to the charges for the Washington trip. That balance was paid on January 18, 2005. Consequently, grievant's Smartpay account was in delinquent status from approximately August 31, 2004 (45 days after the initial billing for the June travel) through January 18, 2005.

Grievant was notified on March 4, 2005 (Jt. Ex. 1, Attach.8) that her supervisor, Joyce Jacoby, was proposing a 60 day suspension due to the June-January delinquency in the Smartpay account. She was afforded all appropriate opportunities to respond to the notice of proposed action, and, on May 26, 2005, a notice of decision was issued by Deputy Director Ben Johnson, sustaining the proposed suspension. (Jt. Ex. 1, Attach. 7).

On December 27, 2004, approximately 20 days before she paid off the balance owing on the Smartpay account for the Washington and Minneapolis trips, grievant received authorization to travel to New Orleans from January 23 to January 28, 2005. She charged \$790.38 to the Smartpay card and submitted a request for reimbursement of \$710.21. That amount was paid to grievant within a few days after March 3, 2005. Charges of \$658.67 appeared on the February 13, 2005 statement and were to have been paid by March 10. The remaining \$131.71 of grievant's authorized expenses for the New Orleans trip appeared on the March 13, 2005, statement. Consequently, the total amount owed as of that date was \$790.38, of which \$658.67 had been due on March 10. None of the account was paid until June 6, 2005, at which time grievant paid \$790.30. The remaining \$.08 was paid on June 28.

In sum, grievant's Smartpay account was in a delinquent status from March 10 to June 6, 2005². Grievant had been notified on March 4, 2005, that disciplinary action was being proposed as a result of previous delinquencies in the account, which had been paid in January. She paid the March-June delinquency after she received the Agency's final decision to suspend her for the earlier delinquency. Grievant was notified on July 1, 2005 that Branch Chief Joyce Jacoby was proposing to remove her from her position as a result of the March-June delinquency. (Jt. Ex. 1) The Union's response to the proposed removal was submitted on July 25, 2005 (Jt. Ex. 2) and Johnson's decision to sustain the removal was issued on August 23, 2005. (Jt. Ex. 5)

Ben Johnson, the Director of the Denver Single Family Home Ownership Center was the deciding official in this case. He testified that he based his decision to accept the recommendation of Joyce Jacoby to discharge grievant after he conducted a thorough review of the entire recommendation, including its attachments. (Jt. Ex. 1). He was aware that grievant had received a reprimand in 2002 for being delinquent in the payment of her Smartpay charges, as well as for using the Smartpay card for a personal expense. Although the disciplinary action was more than two years old and could "not really be considered" in determining the level

²Technically, the account was not paid in full until June 28. However, it is apparent to the arbitrator that the shortage of \$.08 in the June 6, payment was not intended, but was merely the result of misreading the statement balance or other inadvertence.

of discipline to be imposed, Johnson considered the 2002 reprimand as evidence that grievant knew that she was required to pay Smartpay charges in a timely fashion. Johnson also noted that grievant had been suspended for two non-working days for an absenteeism offense and that she received a 30 day suspension in May, 2005 for being delinquent in the payment of her Smartpay charges. In light of grievant's multiple prior offenses and her high rate of absenteeism, Johnson testified, he had lost confidence in grievant's ability to perform her job properly and reliably. Therefore, he concluded that removal was the appropriate penalty.

On cross examination, Johnson acknowledged that he did not write his own decision letter (Jt. Ex. 3), but that it was drafted by personnel in the Human Resources Department based on their discussions with him. Johnson was not aware of the origin or contents of any "Douglas" factor analysis³ in the decision letter, and he did not remember discussing the Douglas factors with anyone in Human Resources. He did not prepare a worksheet analyzing the application of the Douglas factors to grievant's situation.

Johnson was aware that grievant was on Leave Without Pay from February, 2005 until July, 2005, due to joint replacement surgery. He acknowledged that had he been faced with the choice of paying rent or paying the Smartpay charges, he would have paid his rent and would have delayed paying the Smartpay charges. Although

³Douglas v. Veterans' Administration, 5 MSPR 280 (1981)

he initially testified that he considered grievant's health issues and her attendance issues during her mother's terminal illness and death as aggravating factors, Johnson corrected his testimony to indicate that those concerns were mitigating factors.

On the other hand, Johnson considered grievant's long tenure with the agency to be an aggravating factor because "she should have known better" than to be delinquent in the payment of her Smartpay charges. Although he reviewed Jacoby's recommendations, he did not review grievant's personnel file and he did not personally speak to grievant before rendering his decision to sustain the removal. Likewise, he was informed by Human Resources that the Table of Penalties adopted by the Agency provided for disciplinary action of 30 days to removal for a third offense (See, Jt. Ex. 15, p. 6). As grievant had an AWOL offense and the May 2005 suspension within two years of Johnson's decision, Johnson testified, grievant's second Smartpay offense was her third chargeable offense under the Table of Penalties.

When asked by Union counsel how grievant's delinquency in paying the Smartpay debt could impact her job performance, Johnson testified that revocation of the Smartpay card "could hinder" grievant's ability to travel in connection with her job duties. He acknowledged, however, that grievant's card was not revoked, and that she could have obtained a cash advance of 80% of her estimated travel expenses before making a business trip, or she could have

charged her expenses to a personal credit card and obtained reimbursement upon return from her travels. The Agency does not discipline its employees whose personal credit cards are delinquent. He is also unaware of any employees who have been terminated for being delinquent in the payment of Smartpay charges.

Vicky Early is the Director of Operations and Customer Service at the Denver HOC. She testified that she is the person in the HOC who is first notified if an employees's Smartpay account has become delinquent. She investigates the delinquency to determine both whether the account is, in fact, delinquent and whether it has been used for unauthorized expenditures. She serves as an advisor to supervisors in determining appropriate penalties and in writing proposals for disciplinary action. In the present case, she received a memorandum (Un. Ex. 2) from headquarters informing grievant's supervisor, Jacoby, that grievant's account was delinquent in January, 2005. She received a similar memorandum later in the same year concerning grievant's subsequent delinquency. By the time she received the second memorandum, the process had begun to discipline grievant for the earlier offense. After discussions with the Human Resources Department, Early decided that the proposed suspension of May, 2005 should be allowed to run its course before disciplinary action was proposed for the subsequent delinquency.

In her five years as Operations Manager, Early has received approximately five letters concerning delinquent Smartpay accounts. In all other instances, the employees have received either short suspensions or reprimands. No employee has ever been disciplined for being delinquent in the payment of his or her personal credit cards.

Sheila Ricks Jordan is the Agency's Director of Administrative Services. She is responsible for monitoring the Smartpay program. Jordan testified that she receives monthly delinquency reports from the issuers of the Smartpay cards. If an employee is more than 30 days delinquent, Jordan notifies both the employee and her supervisor of the delinquency, but, until the spring of 2005, she issued no directives requiring supervisors to discipline delinquent employees. Jordan has never contacted an employee or supervisor concerning employees' delinquent personal charge accounts.

Under Agency policy, Jordan testified, Smartpay charges are to be paid in full within 60 days after they are billed. The card may be canceled if an employee is delinquent in making payment, or if it is found that the employee has used the card for unauthorized expenditures. Jordan is aware of one probationary employee who was discharged because her Smartpay account was delinquent, but she is unaware of any other employees who have been discharged. As a result of Jordan's efforts to monitor the

accounts, Smartpay delinquencies for the Denver HOC have been less than 1% throughout the years 2005, 2006 and 2007. The Agency had a 0% delinquency rate in June, 2004 (Un. Ex. 4). It has informed its employees that

"Personal use of your HUD credit card is regulated by the Government-wide Standards of Ethical Conduct, which state that employees may not use Government property for non-official purposes and may not use public office for private gain. . . . Employees should be aware that failure to pay the balance in full within 60 days, as well as non-official use, may result in disciplinary action." (Un. Ex. 5)

Under cross examination, Jordan acknowledged that grievant violated the policy only by being delinquent in paying the Smartpay charges. The Agency does not assert that grievant misused her card for unauthorized expenditures, or that she diverted any Agency funds to her personal use.

Barry Kahn is the Agency's Director of Travel Management and has primary responsibility for overseeing Agency travel activities. He testified that in 1998, Congress passed the "Travel and Transportation Reform Act", requiring that all government employees use travel cards to pay their travel expenses unless they are determined by the card issuer not to be eligible for a card. The Cardholder Agreement signed by the employee and the card issuer requires payment in full of all balances within 45 days after billing. A cardholder guide, which was not a negotiated agreement between the Agency and the Union, also reminds employees of that obligation. Although the Agency is not financially responsible for

payment of Smartpay charges, it possesses the authority to terminate an employee's use of a Smartpay card if the employee becomes delinquent or otherwise violates usage policies.

Called as a witness on behalf of the Union, Theodore A. Ford, Director of the Agency's Employment and Support Division from 1999 to 2005, testified that he was responsible for sending letters to employees and supervisors when employees' Smartpay accounts were delinquent. If a supervisor does not discipline the employee, Ford had the authority to request that his superiors impose discipline. He does not remember any case in which he has exercised that authority. In Ford's view, a new offense occurs each time the delinquent amount increases. Thus, if an employee incurs a charge which is not timely paid, the employee has committed one offense. If that charge is paid or partially paid and a second charge is not timely paid, a second offense has been committed.

Ford does not remember any employee other than grievant who has been terminated for delinquent Smartpay accounts or for misuse of a Smartpay card. One employee's husband prevented the employee from paying her Smartpay charges by taking her reimbursement funds she received from the Agency. The employee received no discipline.

Union Executive Vice President Perry Casper is on the Union's negotiating committee and has been involved in the processing of this grievance. He testified that he has heard of no

other employee removed from employment due to delinquent Smartpay charges. As the Agency neither guarantees payment of the charges nor pays Smartpay card issuers directly, it suffers no loss or injury if the debt becomes delinquent. Therefore, there is no "nexus" between grievant's delinquency and her role as an employee of the Agency.

Additionally, Article 49.22 of the Collective Bargaining Agreement specifically provides that the Agency will not act as a collector for the Smartpay card issuer and that it will treat those debts in the same manner as it treats all other financial obligations incurred by employees. Despite the express language of the contract, the Agency is acting as a collector on behalf of the card issuer when it threatens disciplinary action upon learning that the account is delinquent. Although the Agency does not discipline employees for non-payment of any other personal debt, it imposes discipline when the Smartpay card is delinquent.

Union President Gary Mongelli analyzed delinquency reports which the Agency provided to him in connection with the arbitration hearing (Un. Ex. 9). He found 24 instances of employees having delinquent Smartpay obligations in amounts equal to or larger than those incurred by grievant (See, Un. Ex. 10, 11). One employee received a 10 day suspension for a delinquency in excess of \$3,600, while another received a 1 day suspension for a \$5,700 delinquency. A third received a 5 day suspension for

delinquencies of \$3,500. There is no record that any of the other employees received disciplinary action more severe than oral counseling or reprimands despite delinquencies exceeding \$15,000 in one case. In other cases the employees used their Smartpay cards for personal expenses, and also allowed the cards to fall into delinquency status (Un. Ex. 12). One Deputy Assistant Secretary in the Agency had delinquencies as high as \$3,200 (Un. Ex. 13).

Union Vice President Gary Thacker represented grievant throughout the processing of this grievance. He testified that at the oral response and in his written responses to the proposal to remove grievant, he pointed out numerous extenuating and mitigating circumstances all of which were disregarded by the Agency.

With respect to grievant's prior disciplinary record, Thacker testified, grievant's 2002 reprimand was more than two years old at the time of the proposed removal. Under the contract, the record should have been removed from grievant's file and should not have been considered in any way. Likewise, grievant's two day suspension for AWOL was based on a technicality. Grievant called in to report her absence, leaving a message for her Acting Supervisor. She left her "relief slip" on the supervisor's desk rather than handing it to the supervisor. Although grievant did not contest the disciplinary action because she technically had not complied with the Agency's requirements for reporting sick, she had substantively and substantially complied with those requirements.

Likewise, grievant's 30 day suspension, coming after the delinquency for which her removal was proposed, constituted discipline for that delinquency. In fact, the notice of proposed suspension makes specific reference to the \$790.38 delinquency for which grievant was removed. Grievant should not be subjected to two disciplinary actions for the same delinquency.

Thacker also noted that during the period involved in this case, grievant suffered various medical and psychological problems. She was denied advanced sick leave to have hip replacement surgery, thereby forcing her to take leave without pay for an extended period of time. (See, Un. Ex. 7 and 8) Deprived of income and suffering the medical effects of major orthopedic surgery, grievant was faced with a choice of paying for her medical expenses and expenses of daily living or paying the Smartpay debt. As soon as she was financially able to pay the Smartpay debt, she paid it in full. The financial strain of that time period and since, has resulted in foreclosure of grievant's home and in her inability to obtain a second hip replacement surgery. She testified that she has broken her back and now suffers substantial spinal stenosis because she was unable to obtain necessary medical care.

Grievant testified that from 1998 until her mother's death, grievant was her mother's primary care taker, despite her own medical problems. She has suffered substantial emotional and

physical strain throughout the time. During late 2004, grievant was receiving psychiatric care for depression, as well as physical care for her back and hips. She sought but was denied advance sick leave, thereby placing her under significant financial hardship. Despite her financial difficulties, grievant paid all of her Smartpay debt in June, 2005, even before the Agency proposed to remove her from her employment. Since her termination, grievant has lost her home and is in "survival mode." She has been unable to seek new employment because she still needs hip and back surgery.

POSITIONS OF THE PARTIES

Agency Position

Misuse and late payment of government authorized travel cards has been recognized as a serious problem throughout the Federal government. In 2001, a report of the Office of the Inspector General, President's Council on Integrity and Efficiency noted that as of March 2001, federal employees were delinquent by more than \$25 million on their travel cards. Agencies throughout the government were encouraged to remind employees of their duties under the Standards of Ethical Conduct and their travel card agreements to make timely payment of the debts incurred on travel cards. Additionally, managers were instructed to take disciplinary action against employees who "violate the public trust." (Ag. Br. at 12) The Agency's Cardholder Guide (Jt. Ex. 1, Attch.2) and its

Table of Offenses and Penalties (Jt. Ex. 15) both make clear that employees have an obligation to make timely payment of their obligations under the Smartpay cards.

Clearly, the Agency argues, it has the authority to discipline employees who misuse or fail to make timely payment of their Smartpay cards. Their agreement with the issuer of the cards imposes that requirement, and the employee would not have been issued the card, but for the employee's status as an employee of the Federal government. The Agency's policy requiring timely payment had been included in its Cardholder Guide, in the negotiated table of penalties and offenses and in numerous communications issued by it to its employees. Courts and the MSPB have repeatedly approved disciplinary action imposed by Agencies due to travel card misconduct. See, Allen v. U.S.P.S., 466 F.3d 1065 (Fed. Cir. 2006); Casteel v. Dept. of Treasury, 97 M.S.P.R. 521 (2004); Brown v. Dept. of the Army, 96 M.S.P.R. 232 (2004).

There can be no question that the Agency's employees, and grievant, specifically, have been placed on notice of their obligation to make timely payment of debts owed to the issuers of the Smartpay cards. In addition to the notices provided in the Cardholder Guide and Table of Penalties, employees have received various memoranda reminding them of their obligations. Grievant was personally notified of her obligation to remain current when she received a formal reprimand in 2002; when she received notice

of her proposed suspension in March, 2005; and when she received a 30 day suspension in May, 2005. In each instance, grievant was directly informed of her obligation to make prompt payment of the debts and was warned that additional offenses could result in increasingly severe discipline, "up to and including your removal from the Federal Service." (Jt. Ex. 1, Attach. 6, Attach. 8).

The Union's argument that §49.22 of the Collective Bargaining Agreement prevents the Agency from disciplining employees for delinquent Smartpay debts is "entirely misguided and without merit." (Ag. Br. at 17). The agency's actions in disciplining grievant were "nothing more than appropriate and reasonable discipline for admitted misconduct," and were not an attempt by the Agency to assist the card issuer in collecting the debt. The misconduct is identified in the table of offenses and penalties, which was bargained for and implemented after Article 49 was incorporated into the Collective Bargaining Agreement. Provisions negotiated into an agreement later in time than conflicting provisions should take precedence. Moreover the Travel and Transportation Reform Act of 1998 not only requires employees to use travel cards when on official travel status, but also allows Agencies to collect delinquent accounts.

Acknowledging that the burden of proof rests with the Agency to establish that grievant's removal served the efficiency of the service, or was for just cause, the Agency contends that

grievant's removal was well supported by the evidence. "Generally, an Agency must demonstrate three things to uphold an adverse action," the Agency asserts. (Ag. Br. at 17). It must first establish that the charged conduct occurred. 5 U.S.C. §7701. Secondly, it must demonstrate a nexus between the conduct and the efficiency of the service Hayes v. Dept. of the Navy, 727 F.2d 1535 (Fed. Cir. 1984), and finally, it must show that the penalty was reasonable. Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981). The arbitrator may not substitute his judgment for that of the Agency, but may only overturn disciplinary action in order to "assure that managerial judgment has been properly exercised within tolerable limits of reasonableness." Davis v. Dept. of the Treasury, 8 M.S.P.R. 317 (1981); Graybill v. U.S.P.S., 782 F.2d 1567 (Fed. Cir. 1986); Hayes v. Dept. of the Navy, supra.

There is no doubt that grievant allowed her Smartpay debt to become delinquent on numerous occasions in 2004 and 2005. Grievant acknowledged the delinquency both when she received her 30 day suspension and when she was notified of the Agency's proposal to remove her. She has admitted that she submitted a request for a travel advance, which was paid, and that her request for reimbursement after her travels was paid in a timely fashion. Nonetheless, she did not pay the Smartpay obligation when it became due.

An adverse action promotes the efficiency of the service if the grounds for the action "relate either to an employee's failure to accomplish his or her duties satisfactorily or to some other legitimate government interest." Hatfield v. Dept. of Interior, 28 M.S.P.R. 673 (1985). Here, grievant was under an affirmative obligation under her cardholder agreement and Agency policy to pay the undisputed portion of her Smartpay bill each month. Her job duties required her to monitor contractors' performance of their agreements with the Agency and to ensure that the contractors complied with those agreements. She was also required to travel as part of her job duties, and to use her Smartpay card to pay for that travel. See 41 C.F.R. §301-51.1. Her inability to comply with the terms of the cardholder agreement and "the suspension of her privileges to use such a card" severely limited her in the performance of her job duties.

The central issue before the arbitrator is whether the penalty imposed upon grievant exceeded the range of permissible punishment or was "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Gonzales v. Defense Logistics Agency, 772 F.2d 887 (Fed. Cir. 1985); Villela v. Dept. of the Air Force, 727 F.2d 1574 (Fed. Cir. 1984). The facts of this case demonstrate that grievant's "transgressions are exacerbated by a number of factors." (Ag. Br. at 21). Specifically, grievant knew that she was being reimbursed by the

Agency so that she could pay her Smartpay obligations. She received timely reimbursement and had, or should have had the funds available to pay the obligations when they came due. She had previously been placed on notice that she had the duty to pay the debt, and she had, in fact, received discipline for similar offenses in the past.

Whether the arbitrator applies an "efficiency of the service" test under the statute or a "just cause" test under the Collective Bargaining Agreement, the arbitrator lacks the authority to substitute his judgment for that of the Agency. That the Agency could have imposed less severe punishment than it chose does not establish that the selected penalty fails to promote the efficiency of the service or is arbitrary or capricious. Graybill v. U.S.P.S., supra.; Dennehy v. Veterans Administration, 27 M.S.P.R. 31 (1985); Stephens v. Dept. of the Air Force, 58 M.S.P.R. 506 (1993). See, Elkouri and Elkouri, How Arbitration Works, 4th ed.

Initially, the Agency notes, it has developed a Table of Penalties for various disciplinary offenses and it has negotiated those penalties with the Union. The purpose of the table of penalties is to establish a range of penalties which may be imposed for offenses and to provide managers with guidance sufficient to allow consistency in the imposition of discipline throughout the Agency. The Table of Penalties incorporates concepts of progressive discipline by suggesting increasingly severe penalties

for repeated offenses. Once an offense is committed, it may be treated as a first offense in determining the appropriate penalty for another offense of a different nature, and it may "count" as prior misconduct even for unrelated subsequent offenses. See, Parker v. Dept. of the Navy, 50 M.S.P.R. 343 (1991).

In the present case, grievant was suspended for an AWOL offense and for a previous delinquency in paying her Smartpay obligations⁴. Thus, the offense for which removal was recommended was her third offense. Previous discipline, especially the proposed sixty day suspension for another Smartpay delinquency, had clearly not had the desired effect of inducing grievant to improve her behavior. Therefore, removal was a reasonable penalty. The deciding official, Ben Johnson, further testified that he had lost confidence in grievant's ability or willingness to comply with her obligations and that, therefore, removal was seen by him as the only reasonable penalty to be imposed.

The Union has asserted that the delinquency for which grievant was discharged was not her third offense. Rather, it argues because the proposal to remove grievant was issued before a final decision was made upon the proposal to suspend her for the

⁴Although grievant now disputes the propriety of the AWOL suspension, she has not previously challenged any disciplinary action which was imposed during her tenure as an employee of the Agency. The Agency recognizes that the Letter of Reprimand issued in 2002 cannot be "counted" as a prior offense, but it may be relied upon to establish that grievant had notice that she was required to pay her Smartpay obligations in timely fashion and could be disciplined for failing to comply with that requirement.

earlier delinquency, she should not be treated as having committed a third offense. The Agency disagrees. Grievant knew in March, 2005, that a proposal had been made to discipline her. She received notice of the proposal in sufficient time to pay off her Smartpay obligation without becoming delinquent for the second time. Instead, she did not pay the obligation until after she had been disciplined for the first delinquency and had received notice of her proposed removal for the second delinquency. Grievant was given sufficient warning and sufficient time to have avoided discipline. She failed to pay her obligations within that time.

Grievant has also claimed that she is a victim of illegal discrimination in connection with her removal. Specifically, she claims that she has been discriminated against because she is a disabled white female. Where such allegations are made, the burden rests upon the claimant to establish a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981). In order to do so, the grievant must present evidence which, if unrebutted, would support a finding that unlawful discrimination had occurred. Grievant has presented no such evidence. She has failed to establish that she is disabled as defined under the Rehabilitation act, but has merely provided evidence that she underwent orthopedic surgery, from which she has apparently recovered, and a letter from a psychiatrist that she

became depressed when her mother died. Likewise, she has failed to present any evidence that her gender or race contributed in any manner to the Agency's decision to terminate her employment. Although it is true that she is a white female, those facts, standing alone, cannot be sufficient to support a claim that she has been treated differently than other similarly situated employees who are not white females. Grievant's claims of discrimination have not been supported by any reliable evidence and should be denied.

The Union poses the closely related argument that grievant is the victim of disparate treatment in that she suffered substantially greater discipline than other employees similarly situated within the Agency. That argument, the Agency contends, is not supported by the facts. The Union selected 22 Agency employees whose Smartpay accounts were more than 120 days delinquent and exceeded \$1,000. None of those employees was removed. However, under the applicable law, the relevant class of comparable employees consists of employees who are supervised by the same supervisor. See, Godesky v. Dept. of Health & Human Services, 101 M.S.P.R. 208 (2006); Spahn v. Dept. of Justice, 93 M.S. P. R. 195 (2003); and Bell v. Dept. of the Treasury, 54 M.S.P.R. 619 (1992). The Union has presented no evidence that any employee working under the same supervisor as grievant has been similarly situated to grievant. Even if the Denver HOC, consisting of 21 offices

covering 17 states, is considered, only six of the 22 "similarly situated" employees selected by the Union fell within the same supervisory chain of command. There is no evidence that any of them had been delinquent in paying his or her Smartpay account for a second time, or that any of them were being disciplined for a third time within two years. The sole employee who is known to have been delinquent twice is an employee in the St. Louis office. Both he and grievant received suspensions for their first delinquencies. The St. Louis employee had paid his debt before discipline was imposed, and he had not committed any other offense during the time in question. Thus, his second delinquency was a second offense under the Table of Penalties, while grievant's second delinquency was a third offense under that Table.

In sum, the Agency argues, grievant committed a serious offense by becoming delinquent in the payment of her Smartpay obligations twice within two years. Although she was on notice that she could be disciplined for such delinquencies, she persisted in her misconduct. That she committed the offenses cannot be disputed. That she knew she was committing the offenses, likewise cannot be disputed. The discipline she received was within the range specified in the negotiated Table of Penalties, and it should be sustained.

Union Position

The Union agrees with the Agency's analysis of applicable law which holds that in removal cases, the Agency bears the burden of proof. In order for a removal to be upheld, the Agency must prove by a preponderance of the evidence that the employee engaged in misconduct, that there is a nexus between the misconduct and the efficiency of the service, and, finally, that the penalty is reasonable. In order to assure some consistency of decisions, arbitrators in the federal sector must apply the law as enunciated by the MSPB, the federal courts and the EEOC. The Agency has failed to meet its burden of proof.

The Union does not dispute that grievant became delinquent in the payment of charges she incurred on the Smartpay card. Likewise, it does not dispute that grievant had received reimbursement from the Agency to enable her to pay the Smartpay obligations, and that she used those funds, instead, to purchase necessities while she was on leave without pay due to her medical condition. It contends, however, that the Agency has failed to prove a "clear and direct relationship between the articulated grounds for the adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate governmental interest promoting the efficiency of the service." Hatfield v. Dept. of the Interior, 28 M.S.P.R. 673 (1985). In fact, the card agreement through which grievant obtained the

Smartpay card is an agreement solely between grievant and the issuer. The Agency bears no legal or financial responsibility for the use of the card or payment of obligations incurred when the card is used. Grievant's card was not canceled or suspended and the Agency was not "affected in any way by a delinquent payment or payments." Consequently, no nexus has exists between grievant's failure to timely pay the obligation and the efficiency of the service. See, Vilt v. U.S. Marshal's Service, 16 M.S.P.R. 192.

Moreover, §49.22 makes clear that there was no nexus between grievant's offense and the efficiency of the service. That section provides that with respect to the "government charge card program for official travel expenses," the Agency shall not provide more assistance with the collection of debts owed for charges made on the Smartpay card than "is currently available regarding the collection of privately owned debts." It further provides that "unpaid [Smartpay] card debts will be treated as any non-work related debt. Under the express terms of the Collective Bargaining Agreement, debts owed to the issue of the Smartpay cards are "non-work related," and there can be no nexus between grievant's failure to timely pay those debts and the efficiency of the service. That conclusion is supported by the fact that the Agency bears no financial responsibility for the Smartpay debts. It has no role in determining whether an employee is sufficiently credit worthy to be issued the card and it suffers no harm if the debt is not paid in

timely fashion. If an account becomes delinquent, the Agency plays no role in making payment arrangements for employees, who are free to negotiate whatever arrangements are acceptable to the card issuer.

In fact, the Union notes, the Agency suffers no harm even if the card issued to an employee is suspended or revoked. Rather, the employee is still expected to engage in all required work related travel that would have been required had she been in possession of a valid Smartpay card. An employee who is either not issued a card or whose privilege to use the card is revoked is required to pay all work-related travel expenses, either with her own funds or her own credit card, and she is entitled to be reimbursed for the properly incurred charges.

Even if the Agency had been able to prove that grievant engaged in misconduct and that there is a nexus between the misconduct and the efficiency of the service, the Agency has failed to prove that the penalty imposed upon grievant was reasonable. The Agency failed to properly evaluate the "Douglas Factors," thereby rendering the removal decision subject to revision or reversal. See, Toth v. U.S. Postal Service, 76 M.S.P.R. 36 (1997). Likewise the Agency's failure to "seriously consider" alternative penalties calls for the arbitrator to conduct a de novo review of the penalty. In this case, Ben Johnson, the deciding official testified that he gave no consideration to any penalty but

removal. See, Omites v. U.S. Postal Service, MSPB Docket No. CH-0752-00-0241-1 (2000), wherein the Board reversed a removal because the supervisor considered only the penalty of removal under a "zero tolerance" policy concerning violence. See, also, Miguel v. Dept. of the Army, 727 F.2d 1081 (Fed. Cir. 1984); Blake v. Dept. of Justice, 81 M.S.P.R. 394 (1999).

Johnson's testimony demonstrates the Agency's failure to properly consider the Douglas Factors. Johnson failed to examine grievant's personnel file and failed to conduct any reasonable investigation of the facts or to engage in any meaningful review of the Douglas factors before deciding to remove grievant. In such situations, the arbitrator possesses the authority to reverse or modify the adverse action if the arbitrator finds that the Douglas factors were not properly considered or that the penalty imposed by the Agency is unreasonable under all the circumstances. Cataulin v. U.S. Postal Service, 41 M.S.P.R. 681 (1989).

The first factor to be considered is the nature and seriousness of grievant's offense and its relation to her job duties and responsibilities. The Agency has offered no evidence that grievant's conduct was "intentional, malicious or serious in nature." (Un. Br. at 63) Grievant did not misuse her Smartpay card, but merely paid it late. Johnson erroneously considered late payment to be an equally grave offense as misusing the card for personal gain.

Nothing in the nature of grievant's job position or duties indicates that her failure to timely pay the Smartpay debt was a serious offense. Johnson erroneously believed that under the second Douglas factor, he should consider grievant's conduct more serious than normal because grievant was a long-standing employee who "should have known better" than to allow her credit card to fall into delinquent status. Johnson gave no indication that he considered the nature of grievant's job duties and responsibilities, or her prominence within the Agency and among its contractors. See, Ferguson v. Office of Pers. Management, 100 M.S.P.R. 347 (2005) In this case, grievant was not a supervisor and was not in a position of prominence within the Agency or among its customers. Grievant was not responsible for handling money and she held no particular fiduciary responsibility to the Agency. She did not occupy a "position of trust" within the Agency, and she did not become subject to the more stringent behavioral rules that may apply to supervisors or others in positions of trust.

Johnson also incorrectly applied the third Douglas Factor: the employee's past disciplinary record. He testified that in determining to remove grievant he was aware that grievant had received a reprimand in 2002 for misusing her Smartpay card. As that reprimand occurred more than two years before the proposed removal, it was a violation of §20.03 of the Collective Bargaining Agreement to consider it in determining the penalty to be imposed

upon grievant. Johnson testified that he did not "count" the reprimand as a step of progressive discipline, but he also testified that he considered grievant's offense "particularly egregious" because grievant had been reprimanded and suspended for the same offense. Even Johnson's "consideration" of the reprimand was improper in light of the contractual obligation of the Agency to remove it from grievant's record once two years had expired. See, Whitmore v. Dept. of the Navy, 34 M.S.P.R. 137 (1987). Moreover, Johnson acknowledged that he never looked at grievant's personnel file in deciding what discipline to impose. Therefore, he could not possibly have given reasonable consideration to that record.

Johnson evidenced substantial confusion about the meaning and application of the fourth Douglas factor. He testified initially that grievant's past work record, her level of responsibility and her length of service were aggravating factors, because they all indicated that grievant "should have known better" than to allow her Smartpay card to become delinquent. After prodding by counsel for the Agency, Johnson changed his testimony to indicate that he found grievant's work record to be a mitigating factor, but of minor importance. Johnson was not aware of any performance awards grievant had received, nor was he aware of the contents of her performance reviews. Had he reviewed grievant's record, he would have known that grievant worked for the Agency

from 1987 to 2005, during which time she received a competitive promotion and received ratings no lower than fully successful. He would also have known that grievant's challenge to a Performance Improvement Plan had been sustained because the Agency determined that grievant was being required to perform twice as much work as was called for by her job description.

The fifth Douglas factor calls for the deciding official to consider the effect of the employee's offense upon her ability to perform her duties at a satisfactory level and upon her supervisor's confidence in her ability to perform her assigned duties. Johnson testified that he had lost confidence in grievant's ability to perform her job, but he offered no explanation why he had lost confidence. The evidence is clear that even if grievant were denied use of her Smartpay card, she could continue to perform her duties at a satisfactory level merely by paying for her travel expenses from her personal funds and seeking reimbursement from the Agency upon concluding her travels.

There is no evidence that Johnson considered the consistency of the penalty imposed upon grievant with penalties imposed upon other employees in similar circumstances. In fact, the evidence demonstrates that there was no such consistency. Grievant is the only employee to have been removed as a result of delinquent charges on a Smartpay card. Hundreds of other employees throughout the Agency, and a number of employees within the Denver

HOC have not been removed even though they either used their cards for unauthorized expenditures or became seriously delinquent in paying their obligations. Employees who were "hundreds of days late on tens of thousands of dollars" received little or no discipline. (Un. Br. at 69) One employee in the Denver HOC was delinquent on at least four separate occasions, but received only reprimands and was never removed from the service. Grievant's penalty was substantially excessive when compared to the discipline imposed on other similarly situated employees.

The Union asserts that Johnson incorrectly applied the Table of Penalties which was negotiated by the parties. (Jt. Ex. 15) Under that table, the appropriate penalty for a second offense is a 5 to 30 day suspension. The Table of Penalties is a guide to disciplinary action which requires the decision maker to consider all relevant facts of the case and to weigh the Douglas factors.

There can be no question that the eighth Douglas factor weighs in grievant's favor. Her credit card delinquency had no negative impact upon the reputation of the Agency or its personnel. Rather, it was an entirely private matter as to which there was no notoriety or publicity.

As a long time employee with a good personnel record, grievant demonstrated significant potential for rehabilitation. She wrote a letter of apology, acknowledging her error and promising that it would not be repeated (Un. Ex. 3) Both facts

stand in mitigation of the penalty which was imposed. See, Wentz v. U.S. Postal Service, 91 M.S.P.R. 176 (2002); Singletary v. Dept. of the Air Force, 94 M.S.P.R. 553 (2003).

Johnson failed to account for the numerous and significant mitigating factors that applied to grievant's situation. Grievant was suffering serious medical problems and she had been required to take leave without pay for hip replacement surgery at the time the Smartpay card became delinquent. Medical and emotional conditions are entitled to considerable weight as a mitigating factor, where the medical or emotional condition has played a part in the improper conduct. Sherlock v. G.S.A., 103 M.S.P.R. 352 (2006); Wynn v. Dept. of Veterans Affairs, 75 M.S.P.R. 127 (1997); Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272 (2001). In this case, grievant's medical problems contributed substantially to her lack of income and her inability to obtain necessities of life while also paying the Smartpay debt. She essentially was forced to chose between paying the debt and having a roof over her head, and she chose to pay her rent.

Finally, Johnson testified that he did not consider the possibility that a lesser penalty would be adequate and effective to deter grievant from committing similar offenses in the future. Such an evaluation is required under Douglas, and did not occur.

The Union's claim that grievant is the victim of disparate treatment is based upon the undisputed testimony that grievant is the only employee of the Agency ever to have been discharged for allowing a Smartpay account to fall into delinquency. The Union asserts that because the Collective Bargaining Agreement is nationally negotiated, it is intended to be applied in the same manner throughout the Agency, and not merely within a single supervisory unit, as is argued by the Agency. The card program is a national program. All policies relating to the use and payment of the cards emanate from national headquarters and, in fact, national headquarters is the office which monitors the use and payment of the Smartpay cards. Ricks-Jordan testified that the program has been subjected to centralized control because the Agency has an interest in maintaining consistency in the administration of the program throughout the country.

There have been hundreds of examples of Agency employees misusing the travel cards or becoming delinquent in the payment of their Smartpay debts. In many cases, the amounts of the debts, the duration of the delinquencies or the extent of card misuse have been substantially worse than grievant's conduct. Nonetheless, grievant is the only non-probationary employee to have been discharged for failing to make timely payment of her debts.

Additionally, the Union argues, the Agency violated §49.22 by imposing any discipline in this case. That section prohibits management from providing more assistance in the collection of travel card debts than it provides to the holders of any other debts owed by Agency employees. The Agency disregarded that prohibition by imposing discipline for grievant's failure to pay the debt while it imposes no discipline for employees' failures to pay other debts. The threat of disciplinary action concerning travel card debts is clearly "assistance" to the issuer of the travel card that is not offered to the holders of other debts.

Had the Agency considered all relevant facts and had it given fair and equitable consideration to those facts, "there is no way that the Agency would have issued a decision to remove the Grievant. . . Unfortunately, because [grievant] chose to eat and have shelter" rather than pay the Smartpay debt, she was terminated. The agency not only failed to properly consider the Douglas factors, but it failed to consider its own responsibility for placing grievant in a position where she was forced to chose between paying for necessities of life and paying for her travel expenses. Had she been granted advance sick leave, she would have had sufficient funds to pay for all her obligations. Despite grievant's serious and documented medical problems, the Agency denied her request for advance sick leave and deprived her of the ability to pay her obligations.

In sum, the Union argues, grievant's removal violated the Collective Bargaining Agreement and was not reasonably necessary for the efficiency of the service. Grievant should be reinstated to her former position and made whole for all of her losses, including back pay, interest, attorney fees and allowances. Additionally, she should be awarded damages for "emotional duress, pain and suffering, and physical harm."

DISCUSSION

The grievance in this case (Jt. Ex. 4) asserts that grievant was wrongfully removed from her position as a Housing Specialist in the Agency's Denver, Colorado Home Ownership Center in violation of the Collective Bargaining Agreement and applicable laws, rule and regulations. It further asserts that grievant's removal was the result of illegal discrimination based on age, gender or condition of disability, and it requests that grievant be restored to her former position and be made whole for her losses, including damages for emotional duress, pain, suffering and physical harm. The Agency asserts that it removed grievant from her position in order to promote the efficiency of the service, and that just cause existed for her removal.

The arbitrator heard almost three days of testimony, received almost 200 pages of briefs and received over 2000 pages of other written materials. Having reviewed all of the information presented, the arbitrator finds no basis for the Union's claim that

grievant was the victim of illegal discrimination based on gender, age or condition of disability. The sole basis for that claim is the evidence that grievant is a 55 year old white woman who has undergone hip replacement surgery and has received psychiatric care for depression and other ailments. She has never informed the Agency, or her superiors that she is disabled. In fact, she declined the opportunity to accept a disability retirement, thereby denying that she suffers a permanent disability. No objective evidence supports any claim, or even any inference, that the Agency considered grievant's age or gender when determining to remove her from her position. Therefore, the sole question to be determined by the arbitrator is whether grievant's removal was necessary to promote the efficiency of the service and whether that removal was for just cause.

The facts are largely undisputed. Grievant's job as a Housing Specialist was to oversee the performance of contractors employed by the Agency to manage and market residential properties owned by the Agency. That position required that grievant travel from her home base in Denver to various other locations throughout the region serviced from the Denver HOC. Grievant used her "Smartpay" card to pay for travel in the summer of 2004 and in the spring of 2005. She did not pay the charges incurred for the 2004 travel until the spring of 2005, and she did not pay the charges incurred for the 2005 travel until the summer of 2005. In March,

2005, the Agency notified grievant that because she was delinquent in the payment of the 2004 charges, it was proposing to suspend her for 60 days. The decision to suspend grievant was made in May, 2005, after she was also delinquent in the payment of the 2005, charges, and while she was on leave of absence without pay due to hip replacement surgery. Shortly after the decision to suspend grievant for 30 days was issued, and while she was serving that suspension (concurrently with her medical leave without pay) grievant received notice that the Agency was proposing her removal due to her failure to make timely payment of the 2005 charges. Grievant contested both the suspension and the proposed removal, but did not file a grievance concerning the suspension. After the decision was made to remove grievant from her employment, she filed the current grievance.

The Smartpay card is referred to as a "Travel Charge Card" in the Travel and Transportation Reform Act of 1998, P.L. 105-264, 5 U.S.C. §5701. In the present case, the card was a Bank One MasterCard issued in grievant's name by Bank One⁵. The Agency certified to Bank One that grievant was required by her employment to travel away from her home office at least two times per year and that, therefore, she was eligible to receive the card. It also provided grievant with an application for the card. Grievant

⁵Smartpay cards may be Visa cards, Mastercards or Discover cards under the existing program administered by the General Services Administration.

completed the application and submitted it to Bank One. Upon concluding that grievant was credit worthy under its standards, Bank One issued the card in grievant's name. Under the terms of the cardholder agreement, grievant agreed to pay all charges on the card, in full, within 30 days of billing. Bank One agreed that it would not charge interest or late payment fees on charges made on the cards. However, it reserved the right to suspend or cancel the card for if the holder fails to make timely payment in full of the charges.

Other than certifying that grievant's job required her to travel and providing grievant with the application for the card, the Agency had no contractual involvement in the issuance, use, payment or collection of the card. Specifically, the Agency did not agree to pay or guarantee payment of charges made by its employees. However, there is a provision in P.L. 105-264 which permits the Agency to deduct unpaid and undisputed travel card charges from employees' paychecks if those debts are found to be owed by the employee after a "due process" hearing in accordance with regulations adopted by the Administrator of General Services. See, 12 U.S.C. §3413(q).

There is no evidence in the record of this case that Bank One at any time requested the Agency to withhold funds from grievant's paycheck or requested a hearing at which the indebtedness could be proven. Likewise, there is no evidence in

the record that Bank One notified grievant that her account was sufficiently delinquent for it to suspend or revoke her MasterCard, or for it to commence legal action, either through the procedures established by P.L. 105-264 or through a court, to collect the debt. Rather, grievant's payment status, along with the payment status of more than 100 other employees whose accounts were delinquent was reported to the Agency in Bank One's monthly report of accounts to the Agency. Agency officials found the information in Bank One's reports and commenced procedures to suspend, and ultimately to remove grievant from her employment.

For purposes of this award, therefore, the following facts have been established. Grievant was issued a Smartpay card in accordance with the procedures established by an agreement between Bank One and the General Services Administration on behalf of the Agency. She incurred a debt on the card in August, 2004 and did not pay that debt when it was due under her cardholder agreement with Bank One. She incurred a second debt in February, 2005, which also was not paid when due under the cardholder agreement. Bank One undertook no action to collect the debt either through the Agency's internal process or through the courts and it did not suspend or revoke grievant's privilege to use the card. Disciplinary action was initiated by the Agency on its own motion as a result of its review of Bank One's periodic "delinquency" reports. Grievant was suspended for 30 days as a result of her

late payment of the August 2004, indebtedness, but she served that suspension while she was on medical leave without pay. She, therefore, suffered no monetary loss as a result of the suspension. While grievant was on leave without pay, she was notified of her proposed removal for non-payment of the 2005 debt. She paid that debt before a final decision was made on the proposal to remove her from her employment, but after she was notified of that proposal.

The parties are in substantial agreement concerning the basic principles that apply in this case. Both parties agree that the legal principles which control this case are established by statute, rule and regulation, the Collective Bargaining Agreement and the interpretations and decisions issued by the MSPB and Federal courts. See, Cornelius v. Nutt, 472 U.S. 648 (1985). In determining whether disciplinary action is appropriate, the arbitrator must determine whether the Agency has proven by a preponderance of the evidence that an employee has engaged in the alleged misconduct; that there is a nexus between the alleged misconduct and the efficiency of the service, and that the disciplinary action imposed was reasonable in light of the 12 "Douglas factors." Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981).

Grievant incurred a debt of \$855.99 to Bank One for travel in June, 2004. The billing for that travel was received on July 13 and payment was due on August 13, 2004. She incurred an

additional debt of \$722.90 which was due on November 13, 2004. Therefore, as of November 13, 2004, grievant's account was past due in a total amount of \$1,578.89. Grievant paid \$1,000 on December 6, 2004 and the balance of \$578.89 on January 18, 2005. She received a notice of proposed suspension on March 4, 2005, approximately seven weeks after she had paid the debt in full. However, in the meantime, grievant had incurred an additional debt of \$658.67, which was due on February 13, 2005, as well as another debt of \$131.71, which was due on March 13, 2005. As of March 13, 2005, grievant's debt of \$790.38 had not been paid within 30 days of the billing date. It was paid in full on June 6, 2005, approximately two weeks after grievant's proposed removal and more than three months before the decision to remove grievant was made final.

Significantly, neither party has referred the arbitrator to any disciplinary rule which provides that an employee may be subjected to disciplinary action for failing to pay travel card debts when due or which defines when a Smartpay card obligation is "delinquent." The Cardholders' Guide issued to employees when they receive Smartpay cards (Jt. Ex. 1, Attach. 2) reminds employees that

"you are responsible for all charges made to the card(s) in your control. *Intentional misuse or fraudulent abuse may result in disciplinary action.* [emphasis added] Your personal credit may be affected if your account is canceled due to non-payment of the undisputed amount. . .The Department will assume no liability for charges incurred on MasterCard charge

cards nor will the Department be liable for MasterCard charge cards. . . lost or stolen. . . Each month a bill will be sent to the employee's home address for all charges incurred. *The cardholder is expected to make payment in full upon receipt of the bill.*" [emphasis added]

Thus, the guide expressly warns employees that they may be disciplined for misusing or fraudulently using the Smartpay card, but merely indicates that employees are "expected" to pay their bills when due. The guide further sets forth at length, the possible consequences of non-payment of undisputed charges. Specifically, it informs employees that Bank One may suspend their accounts if the accounts are delinquent⁶. Nothing in the guide indicates that employees may also be disciplined because their accounts are past due, or even because their privilege to use the Smartpay card has been suspended.

The only mention of possible disciplinary action concerning delinquencies in Smartpay accounts appears to be in the jointly negotiated table of offenses and penalties (Jt. Ex. 15) issued by the Agency⁷. Offense No. 40 is entitled "Offenses related to Government travel charge card and/or ATM card," and it

⁶An account is considered past due if it is not paid within 45 days of the closing date of the statement. If it is past due, Bank One must notify the employee of the past due status of the payment. It may initiate procedures to suspend the account if payment has not been received within 55 days of the statement closing date, but it may not be suspended if the procedure to suspend has not been commenced within 180 days of the closing date.

⁷In its brief, the Agency refers the arbitrator to Reports of the Office of Inspector General, articles in "Government Executive Magazine" and other memoranda directed to management concerning misuse of or delinquency in payment of travel card accounts. It has offered no evidence that grievant has seen any of that material, or that the Union participated in the creation or dissemination of it.

defines two subcategories: "misuse of card or delinquent in payment" and "misuse of card and delinquent in payment." Penalties for the first level of offenses range from reprimand for a first offense to "30-day suspension to removal" for a third offense.

The Table of Offenses and Penalties does not define "misuse" or "delinquency". However, it appears that the Union, by negotiating the Table of Offenses and Penalties with the Agency accepted that an offense is committed if a Smartpay account is "delinquent."⁸ It has not seriously contested that grievant's Smartpay account was delinquent both in 2004 and in 2005. As discussed below, the lack of clarity concerning the definition of "delinquent" is relevant to the question whether the decision maker, Johnson, adequately considered the Douglas factors. However, for purposes of the first step of the analysis in this case, the arbitrator accepts that grievant allowed her account to become delinquent as asserted in the specifications attached to the notice of proposed removal, and as found by Johnson in determining to remove grievant from her employment.

In determining whether an employee's removal promotes the efficiency of the service, the arbitrator is required to determine

⁸The documents submitted by the parties support numerous definitions of "delinquent." The cardholder agreement and cardholder guide indicate that payment is due upon receipt of the billing for travel charges. Other documents indicate that the charges are to be paid within 30 days after receipt of the billing, while others indicate that payment is due within 60 days and the account becomes delinquent after 120 days. In the present case, all of the debts in question were paid within 120 days of their due dates, but more than 90 days after their due dates.

whether there is a "nexus" or connection between the alleged misconduct and the Agency's ability to accomplish its mission. Hayes v. Dept. of the Navy, 727 F.2d 1535 (Fed. Cir. 1984); Bonet v. U.S. Postal Service, 661 F.2d 1071 (Fed. Cir. 1981). A "nexus" is deemed to exist "when the grounds for the action relate to either an employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest." Hatfield v. Dept. of the Interior, 28 M.S.P.R. 673, 675 (1985). The Union asserts that the Agency has failed to establish such a nexus. The agency argues that grievant breached her "affirmative obligation" to pay her undisputed Smartpay charges, and that her failure to do so "negatively affected her credibility to monitor the compliance of others in the fulfillment of their contractual obligations." (Ag. Br. at 20). It further asserts that her "inability to comply with the terms of the travel card and the suspension of her privileges to use such a card. . . severely limited" her ability to travel in order to perform her job duties.

The arbitrator agrees with the Union that the Agency has failed to establish a sufficient nexus between grievant's failure to timely pay her Smartpay charges and her ability to perform her job. Likewise, the arbitrator agrees with the Union that no legitimate interest of the Agency has been adversely affected by grievant's delinquencies.

It is undisputed that neither the Agency, nor the government in general has incurred any financial liability or obligation as a result of grievant's failure to timely pay her MasterCard account. The agreement to pay the Smartpay debt is exclusively between grievant and Bank One. If the debt is not paid, Bank One's remedies are solely to pursue grievant for payment, either through the "garnishment" process provided in the Travel and Transportation Reform Act of 1998, or through the courts. It may also suspend or revoke grievant's card, but it has no ability to make any claim for payment from the Agency. Thus, grievant's delinquency could not have caused any financial harm to the Agency.

The Agency also asserts that grievant's delinquency in paying her debts "affected her credibility to monitor the compliance of others in the fulfillment of their contractual obligations." No objective evidence supports that assertion, and, in fact, the evidence belies that claim. As acknowledged by the Agency, grievant's delinquency was never disclosed to anyone other than her supervisors and grievant. No contractor dealing with grievant and none of grievant's co-workers had any knowledge of the delinquency. Clearly the contractors and co-workers would have no reason to question grievant's credibility or her ability to monitor contract performance. The evidence further demonstrates that hundreds of Agency employees have misused or failed to timely pay

their travel card debts during grievant's tenure with the Agency. They have continued working in their same job positions without apparent impact upon their credibility. One such employee was an Assistant Secretary in the Agency.

The Agency's claim that grievant's delinquencies affected her ability to engage in travel required by her job is also not supported by the evidence. The Agency claims that the suspension of grievant's ability to use the card "severely limited" her ability to engage in the travel activities required by the job. The evidence establishes that the only time grievant's privilege to use a travel card was suspended was in 2002. The Agency presented no evidence that the suspension had any impact upon grievant's ability to perform her job, and, in fact, she received fully successful ratings while the card was suspended. There is no evidence that Bank One suspended, or even contemplated suspending grievant's use of the card in 2004 or 2005, and the Agency's reference to such a suspension is purely speculative and hypothetical.

Moreover, as the testimony of the Agency's witnesses made clear, the ability to use a travel card is not a prerequisite to performing Housing Specialist duties. All of the witnesses agreed that some employees have failed to meet card issuers' standards of creditworthiness and have been denied travel cards. Others have had their cards suspended or revoked. They, nonetheless, have been

required to travel in order to perform their job duties. In those instances, the affected employees have either been required to use their own credit cards or their own funds to pay for travel expenses or they have obtained expense advances from the Agency and have used the advanced funds to pay for their travel. If grievant's privilege to use the Smartpay card had been suspended, the Agency could still have required her to travel to perform her duties. It would have been grievant's responsibility to pay her travel expenses, subject to reimbursement from the Agency, as she apparently did when her card was suspended in 2002. The Agency has presented no objective evidence that any employee has failed to engage in required travel because the employee either had not been issued a travel card or had a travel card suspended or revoked.

Finally, the arbitrator finds that the Agency agreed in the Collective Bargaining Agreement that there is no nexus between delinquent payment of travel card debts and the efficiency of the service. Section 49.22 expressly addresses the issue by providing that "Unpaid [travel] card debts will be treated as any non-work related debt." If the debt is "non-work related" then, by definition, there is no nexus or relationship between the debt and the employee's work. As a factual matter, all of the witnesses agreed that the Agency makes no effort to monitor or determine the payment status of any debts owed by its employees, presumably because it recognizes that employees' compliance with their private

contracts has no relationship to their job performance or their ability to fulfill their job duties.

The Union also asserts that the Agency failed to properly consider the Douglas factors when it determined to remove grievant⁹. The Douglas factors were originally established in Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981). In Douglas the M.S.P.B. enunciated the standards of review it would apply in adverse action cases and it announced 12 factors which decision makers must consider in taking adverse actions against employees. The case is instructive in a number of respects.

The Board in Douglas characterized the question posed to it as "whether that statutory power [under 5 U.S.C. §1205(a)(1)] includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. The Board concluded that it possessed the authority to mitigate penalties "when the Board determines that the agency imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable." Douglas, supra., at 313. After an extensive review of the Civil Service Reform Act of 1978 and its statutory predecessors, the Board concluded that it possessed the

⁹The arbitrator's conclusion that no sufficient nexus has been shown between grievant's delinquency in paying her Smartpay charges and the efficiency of the service should be dispositive of this case. However, the Union asserts that the Agency's failure to properly consider the Douglas factors is a second and independent reason that the grievance should be sustained.

authority to conduct a de novo review of the evidence and, if appropriate, to mitigate adverse actions taken by Agencies against their employees. If an employee elects to contest agency action through arbitration under a collective bargaining agreement, rather than by way of an appeal to the M.S.P.B., the arbitrator is vested with the same authority, and bound by the same standards of review as the Board. See, Davis v. Dept. of the Treasury, 8 M.S.P.R. 317 (1981); Graybill v. United States Postal Service, 782 F.2d 1567 (Fed. Cir. 1986); Hayes v. Dept. of the Navy, 727 F.2d 1535 (Fed. Cir. 1984).

In Douglas, the Board made clear that:

"insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance [of the evidence] standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstance. In the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation. . . Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action 'decision' necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted. The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein"

Douglas at 324-325. However, the Board recognizes, the appropriateness of a penalty "is by no means a mere factual determination. Such a decision involves. . . the application of administrative judgment and discretion." Douglas at 325, citing Kulkin v. Bergland, 626 F.2d 181 (1st Cir. 1980). "Thus," the Board

noted "an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction." Douglas at 325.

The Board concluded that its authority in evaluating the appropriateness of an adverse action was more extensive than the scope of review accorded to the courts in reviewing decisions of the Board. It noted that its predecessor organization, the Civil Service Commission, possessed authority to determine whether the sanctions imposed were "clearly excessive or were arbitrary, capricious or unreasonable." That scope of review, the Board found, includes but is not limited to determining whether the sanctions were "so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties." Douglas at 327. Thus, the Board concluded, in reviewing Agency actions, it will

"consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness."

Douglas at 329.

The Board's opinion in Douglas established a guide which has been followed by the Board and by arbitrators in reviewing adverse actions throughout the federal service since 1981. The Board directs first that the arbitrator examine the evidence de novo to determine whether an employee has committed an offense or engaged in misconduct. The arbitrator in the present case has concluded that the Agency has established by a preponderance of the evidence that grievant was delinquent in making payment of her Smartpay charges, and that, according to the negotiated table of offenses and penalties, those delinquencies constituted misconduct.

Secondly, the arbitrator must find that the misconduct bears an adequate relationship or nexus for an adverse action and the efficiency of the service. The Board notes that if a sufficient nexus does not exist, no adverse action is appropriate. Rather, "the appropriateness of a particular. . . penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is 'yet a third distinct determination.'" Douglas at 329, citing Howard v. United States (1980) and Young v. Hampton, 568 F.2d 1253, 1264 (7th Cir. 1977). In the present case, the arbitrator has found that the Agency failed to establish the requisite nexus between grievant's misconduct and the efficiency of the service. Therefore, it is the arbitrator's conclusion that no adverse action was appropriate in this case.

Finally, the Board directed that if the misconduct is proven and if a nexus is shown between the misconduct and the efficiency of the service, the Agency must weigh twelve separate factors in determining the appropriate level of penalty. Although the arbitrator has found no nexus between the misconduct and the efficiency of the service, the arbitrator deems it prudent to complete the Douglas analysis and to determine whether removal was an appropriate penalty had a nexus been established.

Douglas directs that the arbitrator first consider "the nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain or was frequently repeated." Douglas at 332. In evaluating this factor, the arbitrator notes initially that the Agency-written cardholder guide does not even mention the possibility that an employee could be disciplined for failing to make timely payment of travel card debts. While it expressly states that an employee may be disciplined for misuse or fraudulent use of the Smartpay card, it merely expresses the Agency's expectation that Smartpay debts will be paid in timely fashion. It implies, therefore, that delinquency in the payment of Smartpay debts is not considered a particularly serious offense.

That conclusion is buttressed by the testimony of Agency witnesses that at one point, government employees had amassed \$25 million in delinquent travel card obligations without significant discipline having been imposed on any employee. By contract, the Agency agreed that it would not consider delinquency in the payment of Smartpay obligations to be any more serious than an employee's delinquency in paying non-work related obligations. Although it must be concluded that grievant made a conscious decision to defer paying her obligations, there is no evidence of malice or intent to achieve personal gain¹⁰. As discussed below, grievant's late payment of her debt was at least in part the result of economic necessity arising from the financial hardship she encountered when the Agency denied her request for advance sick leave.

The second factor to be considered is the "employee's job level and type of employment," including her supervisory or fiduciary role. Grievant was a Housing Specialist monitoring the performance of management and marketing contractors for Agency owned real estate. She had no responsibilities for handling money or items of value and she had no supervisory duties. Rather, her role was merely to assure that private contractors were performing their contractual obligations in proper fashion. There is no

¹⁰The Agency's witnesses expressly disclaimed any intention of accusing grievant of theft, misappropriation of government funds or misuse or fraudulent use of the card.

evidence that she occupied a position of "prominence" or that she had contact with the public.

Thirdly, the decision maker must consider the employee's past disciplinary record. Johnson testified that he was aware grievant had been reprimanded in 2002 for misusing her Smartpay card and for failing to pay it in timely fashion. He acknowledged that the reprimand had occurred more than two years before either grievant's proposed suspension or her proposed removal. He further testified that grievant had received a two day suspension for an AWOL offense, but that suspension was served on grievant's normal days off, so that she lost no pay or benefits. Finally, he testified that the offense for which grievant was removed occurred after she had been delinquent in paying obligations incurred in the summer of 2004.

Initially, the arbitrator notes that Johnson's review of grievant's record was tainted by the Agency's violation of §20.02(2) of the Collective Bargaining Agreement. The extent of that taint cannot be determined, but Johnson testified that he "considered" the 2002 Letter of Reprimand when he decided to impose the maximum penalty of removal. Section 20.03(2) provides:

"Letters of reprimand shall be placed in an employee's Official Personnel Folder for a period specified in the letter, but not to exceed two (2) years."

Grievant received her reprimand in 2002. Clearly, when Johnson considered the reprimand in 2005, it had been placed in grievant's

official personnel folder longer than the maximum two years allowed by the contract. The reprimand should have been removed from the file and should have been unavailable for Johnson's review long before he was called upon to levy a penalty upon grievant for her Smartpay card delinquencies in 2004 and 2005. Had the reprimand been removed from grievant's file as required by the Contract, Johnson may well have decided that a penalty less severe than removal was appropriate.

Johnson also testified that he did not consider the facts and circumstances surrounding grievant's two day suspension for an AWOL violation in 2004. Grievant's explanation of the suspension supports the view that grievant technically violated the Agency's call-in rule because she reported her absence to the wrong person and did not deliver a written notice of the absence directly to her supervisor, but left it on her desk. That the Agency imposed a suspension to be served on grievant's normal days off further supports the proposition that it found a technical violation of the rules, but considered that violation to be insignificant.

It is also significant that grievant was not disciplined for her 2004 payment delinquencies until after her removal was proposed. Grievant was informed of the proposed suspension arising from the 2004 delinquencies only a few days before her travel card account fell delinquent as a result of non-payment of her 2005 travel charges. As a practical matter, she had little if any

opportunity to avoid the later delinquency after she was first informed that the Agency considered her to have violated its policy requiring timely payment of Smartpay card debts. If progressive discipline is to have its desired effect of correcting employee behavior, the employee must have some opportunity to correct her behavior before the next step of progressive discipline is imposed.

The fourth Douglas factor is "the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability." Johnson initially testified that he considered grievant's length of service to be an aggravating factor because grievant had been employed by the Agency for so long that "she should have known better" than to allow her Smartpay debt to become delinquent. With some prodding by Agency counsel, Johnson modified his testimony to indicate that grievant's length of service was a mitigating factor which he considered.

Johnson's testimony concerning his evaluation of the fourth Douglas factor, therefore, is questionable. However, the evidence establishes that grievant was a long-time employee with fully successful or better ratings throughout her career. Both of those elements stand in mitigation of any penalty imposed upon grievant. No evidence was submitted concerning grievant's relationships with co-workers. That element, therefore, was neither an aggravator nor a mitigator. The evidence also

establishes that grievant's dependability dropped significantly in 2003-05, as she missed substantial amounts of work due to her mother's terminal illness and her own medical and emotional problems. As to the fourth Douglas factor, the arbitrator finds no basis to conclude that it stands either in aggravation or in mitigation of the penalty imposed on grievant.

The arbitrator has previously discussed the fifth Douglas factor in connection with the discussion of the nexus between grievant's misconduct and the efficiency of the service. Douglas calls for an evaluation of "the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties." The arbitrator has found that there is no nexus between grievant's delinquent Smartpay account and the efficiency of the service. Inherent in that conclusion is that the delinquency could not affect grievant's ability to perform at a satisfactory level because the delinquency had no nexus or relationship to the job duties which grievant was performing.

Johnson explained that he lost confidence in grievant's ability to perform her job because suspension or revocation of the Smartpay card might hamper grievant's ability to travel. His concern was purely hypothetical, as grievant's Smartpay card was neither suspended nor revoked in 2004 or 2005. Moreover, Johnson's loss of confidence is not reasonable in light of the fact that

employees who do not qualify or do not apply for the card are still expected to engage in travel on behalf of the Agency.

The sixth factor enunciated in Douglas is the "consistency of the penalty with those imposed upon other employees for the same or similar offenses." The arbitrator has no doubt that the penalty imposed upon grievant was dramatically inconsistent with the penalties imposed upon other employees in similar circumstances. By all accounts, grievant is the first and only non-probationary Agency employee to have been removed as a result of misconduct involving Smartpay cards. Other employees, both within the Denver HOC and elsewhere, have used their Smartpay cards for personal expenditures, in some cases, to the extent of thousands of dollars. Countless employees have failed to pay their travel charges in timely fashion, and many of those employees have had long-term or repeated delinquencies. None received punishment in excess of a 30 day suspension. Many have received no discipline whatsoever.

Grievant's delinquency was for a relatively short time and in a relatively small amount. The penalty of removal under those circumstances was inconsistent with disciplinary actions taken against other similarly situated employees and was extremely disproportionate to the punishment imposed by the Agency in all previous cases.

Douglas also enjoins the arbitrator to consider whether the penalty imposed is consistent with the Agency's Table of Offenses and Penalties. There is no dispute that the Table of Offenses and Penalties permits, but does not require, removal as a penalty for multiple delinquencies in an employee's Smartpay account. That removal is consistent with the table of penalties does not mean, however, that removal is an appropriate penalty in every case.

The Agency presented no evidence concerning the eighth Douglas factor: "the notoriety of the offense or its impact upon the reputation of the agency." Johnson gave no indication that he had even considered the eighth Douglas factor, but he acknowledged that he was unaware of any employee, customer or contractor who had knowledge of grievant's misconduct. In light of existing privacy laws, it is unlikely that anyone other than parties directly involved in the disciplinary process had any awareness of the events and circumstances leading to grievant's removal.

Douglas calls for consideration of "the clarity with which the employee was on notice of any rules that were violated. . . or had been warned about the conduct in question. The arbitrator is persuaded that grievant was aware that she was "expected" to pay her Smartpay card charges in timely fashion. However, as discussed above, neither party could refer the arbitrator to a disciplinary rule informing employees that they

could be subjected to adverse actions for failing to pay the Smartpay debts on time. The Table of Offenses and Penalties expresses the "rule" that discipline may be imposed if a Smartpay card is delinquent, but it does not define any of the elements of that offense. As far as the admissible evidence is concerned¹¹ the first written notice grievant received of the contours of the rule was her notice of proposed suspension dated March 4, 2005. By the time it was confirmed that the Agency considered grievant's August, 2004 delinquency sufficient to warrant suspension, grievant had already committed the misconduct for which her removal was proposed. Consequently, the arbitrator finds that the penalty imposed upon grievant, if any penalty were proper, should be mitigated due to the lack of clarity with which the rule was expressed to grievant.

Neither party submitted significant evidence concerning the tenth Douglas factor: the potential for the employee's rehabilitation. Grievant submitted an apology to her supervisor for allowing the delinquency to occur, in which she promised she would not again become delinquent. Johnson testified that he did not feel rehabilitation was likely because grievant had been delinquent in paying her account on three separate occasions.

¹¹The arbitrator finds that the 2002 Letter of Reprimand should be disregarded in all respects because the Agency maintained it in grievant's personnel file well beyond the two year limitation period.

The arbitrator finds Johnson's skepticism to be overstated. As discussed below, grievant's failure to timely pay her Smartpay obligation was caused in significant degree by unique circumstances beyond her control. She was caring for her mother who was suffering a terminal illness. She also had significant and serious mental, emotional and medical problems which had resulted in a substantial loss of income and a serious reduction of her available funds. When grievant was receiving regular pay checks, her Smartpay account was not delinquent. The arbitrator finds no reason to believe that once grievant had been restored to health and was receiving her regular pay, she would not have made payment of her travel expenses in timely fashion. She was never afforded the opportunity to restore her financial condition to normal.

The eleventh Douglas factor calls for an examination of "mitigating circumstances. . . such as unusual job tensions, personality problems, mental impairment. . .or provocation on the part of others involved in the matter." Consideration of the facts of this case leads to the conclusion that there were multiple reasons to mitigate the penalty imposed upon grievant. It is undisputed that during the period from 2003 to 2005, grievant was under unusual stress and medical circumstances which resulted in financial hardship. During the period in question, grievant was required to take leave without pay on at least two occasions. Her

requests for advanced leave were denied¹². As a result, grievant was required to pay her normal living expenses without receiving her pay from the Agency. She ultimately found it necessary to use her travel reimbursements to pay for ordinary living expenses and to defer payment of the Smartpay account until she was financially able to make that payment.

Finally, Douglas calls for an examination of the "adequacy and effectiveness of alternative sanctions to deter such conduct in the future." Johnson testified that he did not believe a less severe penalty would be adequate or effective to deter grievant from having further delinquencies in her Smartpay account because she had previously received a Letter of Reprimand and a 30 day suspension, but had still engaged in the misconduct. As noted above, Johnson's consideration of the Letter of Reprimand in this respect was improper. The Letter of Reprimand should not have been in grievant's personnel file and it should not have been given consideration by Johnson. The thirty day suspension was imposed after grievant had fallen behind in her payment of the 2005 Smartpay obligation and it, therefore, could not have deterred grievant from becoming delinquent. Additionally, it was a 30 day suspension which had no financial consequence to grievant because

¹²The arbitrator notes that §24.07 permits the Agency to advance 240 hours of sick leave to an employee who is ill or injured and has no accrued sick leave. Those requests "may be approved at the discretion of the approving official." In grievant's case, her supervisors exercised their discretion and declined to grant the requests. The denial of that request was not grieved and is not presently in issue.

she served the suspension while she was on leave without pay to obtain treatment of her medical problems. As a practical matter, grievant has never been suspended for travel card delinquencies, but has merely received a decision that if she had not already been suffering the financial loss of a leave without pay, she would have suffered a financial loss for failing to timely pay her Smartpay charges.

In sum, the arbitrator finds that grievant's removal did not promote the efficiency of the service and was not for just cause. The offense for which grievant was removed from her employment has been ill defined and unclearly communicated. There is no nexus or relationship between the offense and the ability of grievant to perform her job duties or the ability of the Agency to accomplish its mission. Even if an adverse action were appropriate, consideration of the Douglas factors leads to the conclusion that facts in mitigation of the penalty far outweigh the facts in support of removal. Therefore, the arbitrator finds that the penalty of removal is so disproportionate to the offense as to be unreasonable, arbitrary or capricious.

As of the date of her removal, grievant had nominally received suspensions, but had not suffered any monetary penalty for the offenses for which she was disciplined. The arbitrator has found that there is no nexus between her Smartpay card delinquencies and the performance of her job duties and that,

therefore, no adverse action is proper. If such a nexus were to exist, the arbitrator would find that the Agency failed to properly consider the Douglas factors and that there were substantial mitigating factors affecting the severity of the penalty which should have been imposed. In light of the fact that grievant's second delinquency (in 2005) was known to the Agency at the time it penalized her for the first delinquency (in 2004), the arbitrator would conclude that grievant should have received no more than a 30 day suspension to be served concurrently with the suspension imposed for the 2004 delinquency.

Having concluded that grievant's removal did not promote the efficiency of the service and was not for just cause, the arbitrator is constrained to fashion a remedy for the wrongful removal. In the normal case, the arbitrator would order that grievant be reinstated to her former position; that she be compensated for her lost wages, less interim earnings; and that all benefits of employment be restored to her as of the date of her removal. However, this case presents abnormal circumstances.

Grievant testified not only that she had no interim earnings, but that she did not attempt to find alternative employment after her removal. Many arbitrators would hold that grievant had a duty to mitigate her damages by seeking alternative employment and that, therefore, she should not be awarded back pay. However, grievant testified that she was medically unable to work

after her removal, and that the removal deprived her of the medical benefits which would have permitted her to obtain a second hip replacement surgery so that she could work. Therefore, the Union seeks a remedy which compensates grievant for all her lost wages¹³. There is merit to the Union's position.

On the other hand, it appears that grievant is unable to work at the present time due to her medical problems. Her reinstatement to her former position, therefore, would be an exercise in futility.

Under the circumstances, the arbitrator finds that the remedy which will most closely approximate the restoration of grievant to the position she would have been in had she not been wrongfully removed from her position is as follows:

1. Grievant shall be reinstated to her former position within two weeks after the date of this Award;

2. Grievant shall be paid all wages or salary she would have earned between the date of her removal and the date of her reinstatement;

3. Grievant's benefits, including but not limited to the accrual of sick leave and annual leave, and her health insurance benefits shall be restored to her as of the date of her removal;

¹³In fact, the Union seeks damages for emotional distress, pain and suffering and similar damages founded in the law of torts. In light of the arbitrator's findings that grievant was not the victim of unlawful discrimination, the only tort alleged in the grievance, the arbitrator finds no basis for awarding such damages.

4. Immediately upon grievant's reinstatement, she shall be placed on leave of absence until such time as her orthopedic surgeon has certified that she is able to return to work. During that leave, grievant shall be entitled to receive payment for all sick leave and annual leave to which she would have been entitled between the date of her removal and the date of her reinstatement, and any such leave which would accrue during the period of her post-reinstatement leave of absence. Once grievant has exhausted all available sick and annual leave, grievant's absence shall be charged to FMLA leave until she has exhausted all available FMLA leave. If she is still unable to return to work, then grievant's employment status shall be dealt with in the same manner as would the employment status of any employee who is unable to return to work after exhausting all available FMLA leave.

AWARD

The grievance is SUSTAINED. Grievant shall be reinstated to her former position and made whole for her losses as set forth above.

ENTERED at Colorado Springs, Colorado, this 18th day of March, 2008.



Daniel M. Winograd, arbitrator

